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Supreme Court of the United States

OCTOBER TERM, 1949

NO. 437

BELLE W. BARUCH,

Petitioner and Appellant Below,

vs.

BEECH AIRCRAFT CORPORATION,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

HOWARD T. FLEESON,
HOMER V. GOOING,
WAYNE COULSON,
PAUL R. KITCH,
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INDEX.

	PAGE
Summary Statement Of The Matter Involved.....	1
Jurisdictional Statement	7
The Questions Presented	7
Reasons Relied Upon For The Allowance Of The Writ	8
Prayer	10

TABLE OF CASES.

Baruch v. Beech Aircraft Corporation, 10 Cir., 172 F. 2d 445	8
Keene Lumber Co. v. Leventhal, 1 Cir., 165 F. 2d 815	6, 10
Nulty v. Hart-Bradshaw Lbr. & Grain Co., 116 Kan. 446, 227 P. 254	6, 10
Russell v. Bovard, 153 Kan. 729, 113 P. 2d 1064	6, 9
Sidney Blumenthal & Co., Inc. v. United States, 2 Cir., 30 F. 2d 247	6,10

STATUTES CITED.

U. S. C., Title 28, section 1254	7

OTHER AUTHORITIES CITED.

84 A.L.R. 52	6
41 Harv. Law Review 728	6
Restatement of Agency, section 312	9
Restatement of Torts	
section 766	9
section 876	9

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was filed in the United States District Court for the District of Kansas by Belle W. Baruch, a resident of South Carolina, against Beech Aircraft Corporation, a Delaware corporation having its principal place of business near Wichita, Kansas. (R. 32) The action is in tort to recover damages for the loss of petitioner's new airplane which crashed in an attempted take-off from respondent's private airport.

In the complaint and supplement thereto it was alleged:

Through a dealer for respondent petitioner purchased from respondent a new airplane at a cost of $63,577.38. (R. 1, 2, 5) Prior to March 27, 1946, and in contemplation of the purchase of the airplane petitioner employed as her personal pilot one H. P. Horton. As a part of his employment contract there was implied by law the obligation to fly the airplane in accordance with applicable regulations of the Civil Aeronautics Authority. One of those regulations forbade any person to pilot an aircraft or to serve as a member of the crew while under the influence of intoxicating liquor. (R. 2)

Horton was given a letter from petitioner authorizing him to take delivery of the airplane on behalf of petitioner. This letter was delivered to respondent and delivery of the plane made to Horton by reason of it. (R. 2, 3)

The plane was left in respondent's custody at respondent's field on April 6, 1946. (R. 3) On the following morning Horton appeared at the field and presented himself to respondent's agent and servant DeSpain. Horton was so intoxicated that he was incapable of exercising any judgment and was so intoxicated that it was highly dangerous for him to attempt to pilot the airplane. Respondent's agents and servants, knowing that the plane belonged to petitioner, that Horton was too drunk to pilot the plane without endangering his own life and the safety of the plane, knowing that it was a violation of law for Horton to fly under such circumstances and being charged with notice that such an illegal flight was a violation of the implied terms

of Horton's contract with petitioner, not only permitted the use of its field for the illegal flight but actively and intentionally participated in it by starting the engines when Horton by reason of his intoxication was unable to do so. By reason of his intoxication Horton was unable to pilot the plane as a consequence of which it crashed on an attempted take-off and was completely destroyed and Horton was killed. (R. 3-5)

From the facts alleged petitioner drew the conclusion that respondent was liable upon three theories —

(a) for knowingly and intentionally assisting a tortious breach of the contract between Horton and petitioner (R. 4, 5)

(b) for wantonness (R. 14)

(c) for negligence in the following particulars:

(1) "in delivering said airplane to the said Herbert P. Horton under the facts above alleged"

(2) "in assisting the said Herbert P. Horton to attempt a take-off as above alleged" (R. 5)

(3) "in permitting the use of its airfield for an illegal purpose, to-wit: the piloting of an airplane by a person under the influence of intoxicating liquor"

(4) "in volunteering assistance to the said Horton and thereafter leaving him in a more dangerous situation than he was in prior to the rendering of such assistance, to-wit: in an airplane while intoxicated, with the motors running, making the plane capable of flight; whereas said plane would not have been capable of flight without such assistance"

(5) "in permitting the use of its airfield by the said Herbert P. Horton when it knew that by

reason of his intoxication he was incompetent to make a safe use thereof"

(6) "in permitting the use of its field when it knew that said Horton was likely to use it in such manner as to create an unreasonable risk of harm to himself and others." (R. 15)

So far as here material the answer was a general denial and a plea of contributory negligence upon the part of Horton and his mechanic, Zozula. (R. 8-11, 13, 14, 27, 28)

Trial was had to the court without a jury. The trial court found:

For some thirty minutes prior to the attempted take-off Horton's intoxicated condition was apparent to everyone with whom he came in contact. Respondent's agent and servant DeSpain observed Horton's state of intoxication and Horton's staggering and believed Horton was too intoxicated to fly the airplane with safety. (R. 34)

Horton made unsuccessful attempts to start the engines. "It was apparent to DeSpain that the unsuccessful attempts to start the engines would shortly run the battery down requiring postponment of the flight." DeSpain got into the plane, located the difficulty and the engines immediately started. "Without DeSpain's assistance the battery likely would have been run down and the flight would have had to be postponed to the following day." (R. 35)

"At the time of the take-off, Horton's degree of intoxication was such as to render him incapable of appreciating the dangers inherent in his attempting to pilot the plane in his condition while at the same causing him to feel a greater confidence in his ability to pilot it than

he would have had in a normal condition. His state of intoxication was such as to render him incapable of normal judgment and to impair his ability physically to carry out any judgment reached." (R. 36)

The plane crashed on the take-off. "The crash was due to pilot error in making a take-off with a cross wind and making a quick climb and in turning downwind before the airplane had a chance to accelerate properly. This maneuver was extremely foolhardy and dangerous and would not have been attempted by any prudent pilot. Horton was an experienced and capable pilot and likely would not have attempted such maneuver except for his state of intoxication." (R. 36, 37)

From the facts found the court concluded that respondent was guilty of negligence in that it failed "to take such steps as were necessary to prevent the use of its airfield for the take-off after the time when it was or should have been apparent that Horton's condition rendered the prospective flight dangerous." (R. 39) The trial court concluded also that Horton and his mechanic Zozula were negligent, that their negligence was imputable to petitioner and that her recovery was barred by contributory negligence. (R. 39, 40) Judgment was entered in favor of respondent on June 23, 1948. (R. 40)

Upon appeal to the United States Court of Appeals, Tenth Circuit, petitioner renewed her contention that respondent was liable for knowingly and intentionally assisting Horton in a tortious breach of his employment contract and urged that recovery on a negligence theory was not barred by any acts of Horton or Zozula for the following reasons:

(a) Contributory negligence is not a bar to recovery for a tortious interference with contractual relations.

(b) The contributory negligence of a servant may be imputed to a master only when the negligence of the servant and the third person is concurrent and not joint.

(c) Where an actor's conduct is negligent only because of the intoxication of the injured party, such intoxication does not bar a recovery by the injured party.

(d) Horton was in a position of peril and because of his intoxication was mentally unable to extricate himself therefrom. Respondent knew he was in such a position and had a clear chance to avoid the impending harm to petitioner but nevertheless proceeded negligently to make possible the loss of petitioner's airplane. The doctrine of last clear chance is therefore applicable.

(e) Zozula did not violate any duty owed either to respondent or to petitioner and his acts found by the trial court to be negligent were not committed within the course and scope of his authority. (R. 42-44)

The Court of Appeals in an opinion reported in 175 F. 2d 1, and included in the record at page 81, held that under the modern rule of interference with contractual relations as stated in *Sidney Blumenthal & Co. v. United States,* 2 Cir., 30 F. 2d 247; *Keene Lumber Co. v. Leventhal,* 1 Cir., 165 F. 2d 815; cases collected in 84 A.L.R. 52 and 41 Harv. L.R. 728, petitioner would be entitled to prevail, but that under Kansas law as stated in *Nulty v. Hart-Bradshaw Lbr. & Grain Co.,* 116 Kan. 446, 227 P. 254, and *Russell v. Bovard,* 153 Kan. 729, 113 P. 2d 1064, petitioner was required to but did not show that respondent's intentional interference with Horton's contractual obligations to petitioner was done for the specific purpose of causing Horton to breach his contract with petitioner.

Although the issues of negligence and contributory negligence were fully briefed and argued by both parties, the Court of Appeals refused to pass upon petitioner's cause of action for negligence, stating:

> "While the trial court found negligence and contributory negligence, and based its judgment thereon, the claim is not based upon negligence. None is alleged or invoked as a basis for recovery. The question of negligence or contributory negligence cannot, therefore, be determinative of Beech's liability or Baruch's right to recover." (175 F.2d 3, R. 84)

Judgment affirming the judgment of the trial court was entered in the Court of Appeals on May 27, 1949. (R. 86) Petition for rehearing, timely filed, was overruled on August 2, 1949. (R. 86, 103, 104)

JURISDICTIONAL STATEMENT.

It is contended that the Supreme Court has jurisdiction to review the judgment in question under Title 28, section 1254, of the United States Code. The judgment sought to be reviewed was entered May 27, 1949. (R. 86) Petition for rehearing was overruled August 2, 1949. (R. 104)

THE QUESTIONS PRESENTED.

1. May a Court of Appeals evade determination of a material issue raised by the pleadings, covered by the evidence, determined by the trial court and briefed and argued by the parties in the Court of Appeals, by arbitrarily denying that the issue is presented by the record?

2. Was the Court of Appeals justified in concluding that under local law intent to cause a breach is an essential element in a cause of action for knowingly and intentionally *assisting* in a tortious breach of a servant's

employment contract simply because the state court in reported decisions had allowed recovery upon a cause of action for *inducing* breach of contract, in which intent to cause a breach is an essential element in all jurisdictions, where the modern rule in all jurisdictions which had passed upon the question including the Courts of Appeals for the first and second circuits was to the contrary?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

Although negligence was pleaded in six separate particulars (R. 5, 15) and found by the trial court (R. 39), the Court of Appeals refused to pass upon the cause of action for negligence, evading the issue by mis-stating that the record showed that negligence was neither pleaded nor relied upon by petitioner as a basis for recovery. (175 F.2d 3, R. 84) This misstatement of the record was made despite the fact that only four months previously on the same record in the same case on petitioner's motion to remand to allow the trial court to entertain a motion for a new trial the same court said in a published opinion that the action was one for negligence. (*Baruch v. Beech Aircraft Corporation,* 172 F. 2d 445, at page 446.) The refusal of the Court of Appeals to determine petitioner's cause of action for negligence was a refusal to exercise the appellate jurisdiction enjoined upon it by statute, was a denial of due process of law, and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The decision of the Court of Appeals against pe-

titioner's cause of action for knowingly and intentionally assisting petitioner's employee Horton tortiously to breach his employment contract was stated to be founded upon the cases of *Nulty v. Hart-Bradshaw Lbr. & Grain Co.*, 116 Kan. 446; 227 P. 254; *Russell v. Bovard*, 153 Kan. 729, 113 P. 2d 1064, and Restatement of Torts section 766 cited in the Russell case. Both the Nulty and Russell cases were actions for inducing breach of contract and recovery was allowed in both of them. The authorities cited in those cases do indeed indicate that in an action for inducing breach of contract purpose to cause such breach is an essential element and we understand that to be the law in all jurisdictions. Restatement of Torts section 766. The Court of Appeals, however, drew from those cases the conclusion that purpose to cause a breach is under Kansas law an essential element in an action for knowingly and intentionally assisting a tortious breach of contract by an agent or servant, a situation which has never been before the Supreme Court of Kansas in any case. The Court of Appeals was wholly unwarranted in concluding that because the Supreme Court of Kansas had permitted a recovery under the rule stated in Restatement of Torts, section 766, in cases to which that section was applicable that it would reject the rule stated in Restatement of Torts, section 876, and Restatement of Agency, section 312, if and when presented with a case to which those sections are applicable. Both of those sections make the essential element to a cause of action for assisting a tortious breach of a contract knowledge of the contract and intentional assistance in the tortious act rather than purpose or motive to cause a breach. The Supreme Court of Kansas has never passed upon a case involving intentional assistance in a known tortious breach of contract.

The decision of the Court of Appeals that an essential element in such a cause of action is intent to cause a breach is concededly in conflict with the weight of modern authority, is in conflict with the decisions of the Courts of Appeals for the first and second circuits in *Keene Lumber Co. v. Leventhal,* 1 Cir., 165 F. 2d 815, and *Sidney Blumenthal & Co. v. United States,* 2 Cir., 30 F. 2d 247, and should be reviewed by this court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said the United States Court of Appeals for the Tenth Circuit had in the case numbered and entitled on its docket, No. 3765, Belle W. Baruch, Appellant, v. Beech Aircraft Corporation, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment of said United States Court of Appeals for the Tenth Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated October 27, 1949.

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